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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 148

REMINGTON RAND INC., *Intervenor-Petitioner,*

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A. ETC. (Interhandel), *Plaintiff-Respondent,*

and

J. HOWARD MCGRATH, Attorney General of the United States as Successor to the Alien Property Custodian, and GEORGIA NEESE CLARK, Treasurer of the United States, *Defendants-Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

REPLY BRIEF OF REMINGTON RAND INC., PETITIONER.

WILLIAM P. MACCRACKEN, JR.,
Attorney for Petitioner.

Of Counsel,
URBAN A. LAVERY,
WILLIAM W. BARRON,
FRANK C. STERCK.

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I. THREE MISLEADING ASSERTIONS.

Petitioner desires to correct three misleading assertions by respondent, Interhandel, in the statement included in its brief in opposition.

A. It is said at page 7 that "Remington Rand, however, has now abandoned its contention that it should prevail on the merits * * *."

This is not true.

Rule 38 of this Court limits the scope of a petition for certiorari. A brief on the merits has no place in the petition. The questions upon which we invoke the writ require no discussion of the merits. But our petition makes it clear that the errors and departures of the two courts below rendered impossible a just determination on the merits. Petitioner has never wavered in its position that it is entitled to the shares of GAF stock, should Interhandel be entitled to their return. We would not be here if Remington Rand had "abandoned its contention that it should prevail on the merits". Our opposition has made an irresponsible statement.

B. At page 12 of its statement, Interhandel asserts that petitioner assumed two completely inconsistent positions by arguing for a reversal on the merits and at the same time pointing out that the court below was without jurisdiction. There is no inconsistency. True, petitioner contended for a reversal and still contends that the judgment was wrong on the merits. Is it ever wrong or improper for counsel to point out to a court its lack of jurisdiction? Would we not have been derelict in duty by concealing our honest belief that the court below had no power to entertain the appeal and that the district court had no power to enter its *nunc pro tunc* order in an effort to shore up the faulty basis of appellate jurisdiction? By thus pointing out the want of jurisdiction, were we precluded from arguing that the judgment was wrong on the merits? If so, then indeed as Emerson said, "a foolish consistency is the hobgoblin of little minds".

This Court, in *American Fire & Casualty Co.* v. *Finn*, 341 U. S. 6, held that estoppel cannot operate to confer jurisdiction. There, the defendant, who removed a case from state to federal court, appealed from an adverse judgment and challenged the jurisdiction of the federal district court. This Court sustained the objection and held that defendant was not estopped from objecting to want of jurisdiction.

C. Interhandel's statement, also at page 12, says that in the decision of the Court of Appeals, 188 F. 2d 1011, "It was noted that Rule 54(b) had been fully satisfied and the court did not consider any further discussion of the matter necessary. (R. 400)". We find no such statement in the record. The court's only reference to Rule 54(b) is quoted in our petition at page 8 and demonstrated to be completely inaccurate. (P. 11-12).

Counsel perhaps infers, and would have this Court infer, that the court below considered that Rule 54(b) had been fully satisfied and considered further discussion unnecessary. The court below said nothing of the kind. One can only speculate upon what was in its mind when it brushed off the question of jurisdiction without any discussion after an hour of argument had been devoted to that question alone, prior to the argument on the merits. (R. 399). Interhandel's statement obviously is inferential rather than factual.

II. THE FACTUAL ISSUES SUMMARIZED.

Ordinarily the factual issues are not argued in a petition for certiorari. Therefore our petition stated only the facts necessary to an understanding of the questions. However, Interhandel's opposing brief devotes ten pages to a biased and slanted presentation of the factual issues which should not go unchallenged. (Br. 3-13). Not only for that reason but also because of the special and unusual nature of the case itself, as well as its public importance the following summarized statement is here set out:

> 1. Shortly after the outbreak of World War II, the Alien Property Custodian seized and later vested 445,624 shares of the Common A stock and 2,050,000 of the Common B stock of GAF (R. 9), which stock had been previously owned by Interhandel. That stock is the subject matter of the present litigation between RemRand and Interhandel. It is also the subject of the basic suit of Interhandel to recover the stock for itself. The RemRand intervention has not delayed that

litigation. The question whether GAF is to be foreign owned or American owned is involved in this litigation. RemRand is American owned and if its position is sustained, GAF is certain to become American owned.

2. Interhandel is a Swiss corporation of dominantly foreign ownership. Both GAF and RemRand are large American industrial corporations, organized under the laws of Delaware.

3. The present day value of this GAF stock is admitted to be from $60,000,000 to $100,000,000.[1] There is no testimony as to the corresponding value of the seized property at the time of seizure, but presumably it was very much less than the figures above indicated. In June, 1946, Interhandel was not only willing but anxious to make a contract to sell the seized GAF stock to RemRand for a price of $25,000,000, payable in Switzerland, said contract to be performed upon the return of the stock to Interhandel.[2]

This GAF property, therefore, has more than doubled in value since 1946.[3]

4. Interhandel has consistently claimed (and claims in its basic suit against the Government to recover this GAF stock) that there was no just or legal ground for the seizure of its property. The Government is

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[1] See testimony to that effect February 19, 1951, by the Attorney General before a House Committee, printed in "Hearings" 82nd Cong., 1st Sess., "*Department of Justice Appropriations for 1952*", p. 12.

[2] See the frank admissions to this effect by Interhandel's President and General Manager respectively (R. p. 257 and R. p. 221). The National Association of Securities Dealers Quotation Service shows that GAF Common A stock (the only on the market) reached a high of 110 in 1951; whereas that stock sold in December, 1941, just prior to seizure at 44.

[3] This point of doubling in value is obviously pertinent here because the Government's brief (p. 11) attempts to justify the action of the trial court in splitting off the RemRand proceedings and ordering them to trial in advance of the main suit by saying:

> "The Court acted in its discretion in order to protect the property from deterioration or loss * * *."

That charge of "deterioration" which the Government made to the trial court (R. 396) was entirely groundless.

now engaged in long and protracted litigation with Interhandel over that issue. Interhandel's suit to recover its stock was started in October, 1948, and at the present time—three years later—that litigation may last for several years.[4]

5. It is conceded on this Record, both by the Government and by Interhandel, that the American Government is determined that the control of this important industrial concern of GAF will never be permitted to return to foreign ownership. At the same time the United States Government has definitely announced its determination to get out of this GAF business and return it to private ownership as soon as may reasonably be done.[5]

6. RemRand is a leading American industrial concern, with world-wide interests, whose particular field of production would be favorably supplemented and augmented by the acquisition of the GAF plants and processes—particularly in the photographic field. It was for these reasons that RemRand after the end of World War II, began its negotiations with Interhandel, in Switzerland, looking toward the eventual purchase of this GAF stock. After many months of protracted negotiation, carried on with the knowledge and implicit approval of the United States Government, RemRand and Interhandel reached a meeting of the minds as to

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[4] This point, about the long protracted litigation between Interhandel and the Government is pertinent here in view of the Argument in the Government's brief (p. 6) about the Government's desire "to settle" with Interhandel. That suggested "settlement" between Interhandel and the Government was in fact in no way hampered or obstructed by RemRand's intervention suit. But that proposed "settlement" seems now further away than ever. Indeed the Attorney General in his testimony before Congress in February, 1951, above cited, admitted this point by saying: "Unless we get some Congressional help in the matter this litigation will be carried on for years."

[5] For admissions by Interhandel that the GAF stock would never be permitted to be returned to foreign ownership, see Interhandel's Minutes for May, 1946 (R. 334 to 337). For repeated statements by the Attorney General of the Governments's desire to get out of this GAF business "as soon as it can" and to put that Company "back into private hands", see the testimony of the Attorney General February, 1951, *supra*, Note 1.

such proposed purchase on an if-as-and-when basis. In June, 1946, Interhandel made a formal, oral "Declaration of Readiness" to RemRand for such proposed purchase at an overall price of $25,000,000 to be paid in Switzerland if and when the GAF stock would be released from seizure and could be delivered under the contract. The specific terms of that oral Swiss offer were set out, at the time, in writing in the Minutes of Interhandel at its meeting in May, 1946, and constitute a crucial part of the documentary evidence in the present litigation. (R. 336-37).[6]

7. The final date for acceptance by RemRand of the Swiss offer was originally fixed by Interhandel as June 30, 1946. However, that final acceptance date was extended by Interhandel from time to time until May 6, 1947. (R. 358).

8. Following the Swiss offer of June, 1946, to sell its GAF holdings to RemRand, and down to about the middle of April, 1947, both RemRand and Interhandel fully cooperated in efforts to have the Alien Property Office release the vested GAF stock and accede to the proposed sale of that stock from Interhandel to RemRand.

9. On May 5, 1947, and before the expiration date of the Swiss offer, RemRand accepted that offer by two written cablegrams sent to Interhandel.[7]

10. For some unexplained reason, Interhandel waited twelve days after the receipt of the RemRand acceptance, and then on May 17, 1947, replied to RemRand by cablegram and letter in an effort not only to reject RemRand's acceptance, but also to repudiate completely its offer to RemRand.[8]

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[6] It should be stated that the overall price of $35,000,000 indicated in those Minutes of May, 1946, was adjusted in June, 1946, so that the "cash sum" to be paid by RemRand was reduced to $25,000,000.

[7] The terms of the two cablegrams from RemRand to Interhandel are set out by admission in the answer of Interhandel (R. 11-13) to RemRand's intervention complaint.

[8] The Swiss repudiation of its June, 1946, offer to RemRand, as well as its rejection of RemRand's attempted acceptance of that offer, are set out and admitted in Interhandel's Answer. (R. 11-13).

11. The evidence at the trial clearly indicated that the Alien Property Office (through the Department of Justice) was the actual instigator of Interhandel's Notice of Termination of its offer to RemRand. The reason was that the Alien Property Office in April, 1947, had itself begun "direct negotiations" with Interhandel looking toward a "settlement" of the claims of the Swiss concern for the return of its seized property.[9]

12. In October, 1948, RemRand, after leave of court duly had, filed its intervention complaint. RemRand alleged that by virtue of the foregoing facts, an enforceable preliminary contract had come into being between itself and the Swiss concern, which contract was to be mutually carried out and executed by the parties upon the successful release to Interhandel, by the Alien Property Office, of the seized GAF stock.

13. RemRand in its intervention complaint (R. 2) asked the district court for a declaratory judgment to the effect that, *if the district court should find Interhandel "entitled to the return of such shares"*, then RemRand would be entitled to a decree against Interhandel enforcing such contract.

14. It was proved at the intervention trial and was found as a fact by the district court (R. 35) that under Swiss law no consideration was necessary to support the preliminary contract above mentioned between RemRand and Interhandel; and that an offer made for a certain period of time (as the Swiss offer was) is binding until the period, for which the offer has been given, has expired.

Interhandel's Main Defenses.

As the opinion of the Court of Appeals shows (R. 401-402), Interhandel interposed three main defenses to RemRand's intervention complaint, which may be summarized as follows:

1. It was first contended that the Swiss Offer, as formulated in its oral "Declaration of Readiness"

[9] The Minutes of Interhandel for April 21, 1947 (R. 355 to 358) make this point entirely clear.

made to RemRand, did not constitute a *binding offer* under Swiss law, even for the period for which it was expressly specified; but was a mere "gentlemen's agreement," not enforceable in the courts. The evidence however shows conclusively that no mention or even intimation to that effect was made by Interhandel either in the recitals of its oral "Declaration of Readiness" of June, 1946, or in its written Minutes of May, 1946, which had authorized that offer.[10]

2. It was next contended by Interhandel that its offer to RemRand was made upon certain "conditions precedent", and that these conditions were not only precedent to the execution and carrying out of the contract by RemRand, but were actually *precedent* to any *acceptance* by RemRand. In other words it was contended that RemRand was somehow required to secure the full release of the GAF stock from the Alien Property Office, before RemRand could even make a binding acceptance of the Swiss offer. Here again the evidence showed that this "condition precedent" contention was a complete after-thought on the part of Interhandel and was a plain *ante litem motam* contention.[11]

3. Finally it was contended by Interhandel that its proposed contract to RemRand could only be accepted by the Remington Rand corporation *per se;* and that the actual acceptance by RemRand through one of its subsidiaries was insufficient. This contention was made in spite of the fact (a) that the Swiss Minutes of May, 1946, specifically authorized the offer to be made "to an American group which is interested" (R. 336)—meaning the RemRand group; and in spite of the fact (b) that the Swiss "Declaration of Readiness"

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[10] The evidence shows that the first time the term, "gentlemen's agreement," appears in the Swiss Minutes is in the recitals for the meeting of January 16, 1947, (R. 357-9) more than six months after the offer to RemRand had been made.

[11] The evidence conclusively shows that the first time the term "conditions precedent" (or anything like it) was used by Interhandel was in its Minutes of May 17, 1947, (R. 362); where in a cablegram to be sent that day to Mr. James H. Rand, Interhandel for the first time referred to the "main conditions precedent" of the Swiss offer. By that time the controversy had already arisen.

of June, 1946, was made by Interhandel to "one of the groups" represented by RemRand (R. 391). Moreover as early as the first days of January, 1947, RemRand had submitted to Interhandel in writing the name of its proposed subsidiary that would accept the Swiss offer, and Interhandel at no time made any objection to that plan, until after the acceptance had been actually made. Here again the evidence shows that this particular defense is likewise a complete after-thought on the part of Interhandel.[12]

III. INTERHANDEL'S ARGUMENT.

The argument of Interhandel in several respects is recklessly misleading. For example on page 14 of its brief, it argues, "If the complaint (in intervention) was lacking in merit, as was found to be the case, then the intervention litigation was 'in the nature of a strike suit' (R. 394, 396)."

The district court was probably familiar with the term, "strike bill." Webster gives as one of the definitions of the noun, "strike," the following:

> Act of obtaining or attempting to obtain money by importunity or any form of blackmail or threat, esp. by introducing in a legislature a bill (strike bill) which would be harmful to a person or corporation if enacted into law in order to obtain a bribe for withdrawing it.

Would counsel for Interhandel have this Court believe that every action in which the claim for relief is defeated is a strike suit? Or that the district court used the term in that sense, and thus prejudged the case? Or is the argu-

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[12] Interhandel's Minutes themselves (R. 347-49) show that as early as January 8, 1947, RemRand had submitted to Interhandel documents concerning its proposed acceptance which gave the name of the RemRand subsidiary (American Aniline and Chemical Co.) which it was proposed would make the actual acceptance of the Swiss offer. Moreover extended negotiations about those preliminary documents were had between RemRand's attorney and the Swiss officials in Switzerland in March, 1947, (R. 379 to 390); and testimony of Mr. Garey for RemRand, (Dist. Ct. Tr. 733), at which time the name of the proposed subsidiary was again repeatedly discussed.

ment merely a device to draw attention from the departures of the trial court from the usual and accepted course of judicial proceedings?

For it is beyond controversy that the suggestion that this was in the nature of a strike suit is just as contrary to fact and without any support in the evidence as is the baseless suggestion that the property involved was in the nature of being perishable. (See Pet., p. 10, 11 and footnote 7). It is equally obvious that a separate trial of the intervention issues would not have been ordered except for these reckless misrepresentations. Interhandel reaches the conclusion that separate trials were inevitable and justifies the premature trial of the intervention issues as an exercise of judicial discretion, "governed by the facts". (Respondents Br. pp. 14, 15). But, as we have shown, there were no facts; and there was no evidence to show that the order for a separate trial was "in furtherance of convenience and to avoid prejudice" as required by Rule 42(b). On the contrary, the petitioner was seriously inconvenienced and prejudiced. And neither the Government nor Interhandel asked for a separate trial.

The trial court, as pointed out in our petition (Pet. p. 10), could have saved expense and avoided prejudice by first determining whether or not Interhandel is entitled to the return of its property. If not, then the claim of the petitioner, Remington Rand, falls, and the long trial of the intervention issues would have been avoided. The separate trial of the intervenor's claim after the trial of the main action would have been a just exercise of discretion under Rule 42(b). The premature, separate trial of the intervention issues was an abuse of discretion so clear and so serious as to present error apparent on the face of the record which this Court may and should correct, even if objection was not made at the trial.

IV. THE GOVERNMENT'S ARGUMENT.

The Solicitor General opens his argument by making a contention which is wholly without merit. He says at page 7 of his brief that the trial judge "supplied a clerical omission in its record after the appeal was taken, by inserting into its judgment, *nunc pro tunc*, its earlier determination that there was no just reason for delay, in compliance with F. R. C. P. Rule 54(b)."

The finding of no just cause for delay is a judicial finding which was not made by the district court when judgment was entered. (R. 37). There is nothing in this record to indicate an omission on the part of the clerk. The omission was that of the trial judge. The motion of Interhandel for the *nunc pro tunc* order states that the trial court "made no express determination that there was no just reason for delay", and that "it is conceivable that Rule 54(b) could be deemed applicable." The order of the trial court recites, "Upon consideration of the motion of plaintiff * * * for an Order *Nunc Pro Tunc*, and having expressly determined *prior to* and at the time of the entry of the final judgment herein that there was no just reason for delay * * *". (R. 413, 414). (Emphasis supplied.) There was no expression by the court as to a determination of "no just reason for delay" at the conclusion of the trial or at any time thereafter until Interhandel made its motion for a *nunc pro tunc* order.

The words "prior to"[13] were obviously inserted to justify and strengthen the *nunc pro tunc* order. We infer that the hand that drafted the order also drafted the motion (R. 408-410). Indeed, the motion (R. 409) quotes and relies upon the language of the court's memorandum of December 21, 1949, (R. 396). Neither at the conclusion of the trial nor on April 26, 1950, when judgment was entered

[13] See Government's Brief p. 6 wherein this "prior to" theory has its seed; namely, on December 21, 1949, (R. 394)—four months before the trial court entered judgment dismissing RemRand's complaint of intervention, April 26, 1951.

(R. 37), was any finding of no just reason for delay made, or suggested, by the judge or counsel. Rule 54(b) declares that the "court may direct the entry of a final judgment only *upon* an express determination that there is no just reason for delay." (Pet. pp. 4, 5). Manifestly, this determination should be made and recorded simultaneously with the entry of judgment but certainly not at a time prior to trial.

The somewhat specious argument that the *nunc pro tunc* order might be authorized by Rule 75(h) is not seriously pressed. Indeed, it lacks any quality of persuasion. The motion (R. 408) does not refer to it. Rule 75(h) gives the trial court power to correct the record. The record in the case at bar did not need correction. It was the accurate record of what occurred during and at the close of the trial. The *nunc pro tunc* order merely distorted it.

Apparently, the Solicitor General is of the view that the serious, weighty, undecided question of Federal law posed by petitioners Point III is best brushed aside by ignoring most of the cases cited by us in support of the clear, sharp conflicts on the points involved between the various courts of appeal. The Government's brief does not even mention this Court's opinion in *Dickinson* v. *Petroleum Conversion Corp.*, (1950) 338 U. S. 507, discussed in petitioner's brief at pages 18, 19 and 20, with reference to the application of Rule 54(b) to separate judgments dismissing complaints of intervention.

The petitioner asserts that the *nunc pro tunc* order was an illegal attempt to give the appellate court jurisdiction which otherwise did not exist. The Government seeks to avoid this obvious truth by a series of hedge-hopping and inconsistent conclusions. Thus, pages 8 and 9 of its brief suggest that it is doubtful whether explicit leave of the appellate court was required to authorize the *nunc pro tunc* order, but that in any event the consideration of the appeal was a tacit approval or ratification which is the equivalent of express leave of court, and in support cites *Vale* v. *Bonnett*, C.A.D.C. 1951, 15 Fed. Rules Serv. 54(b) 4.

In the *Vale* case, after argument and following a suggestion from the bench, appellant was allowed time for the preparation of a supplemental brief on the point of lack of compliance with Rule 54(b). To his brief, appellant attached an "Order Correcting and Amending Order for Summary Judgment Nunc Pro Tunc." Upon this order, counsel for both parties "endorsed their consent."

In that case the court below labored under the misapprehension that the case at bar was in all respects similar and that the consent of the parties to the *nunc pro tunc* order was equivalent to compliance with Rule 54(b).[14]

The cases are not at all similar. In the case at bar there was no consent to the *nunc pro tunc* order. On the contrary, petitioner opposed the order (R. 411-413).[15] In the *Vale* case both parties endorsed their consent on the order which was entered after argument in the appellate court. In that case the judgment of the district court was reversed, thereby rendering moot the question of compliance with Rule

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[14] The court in *Vale* v. *Bonnett*, said:

> "The issue thus presented is whether this nunc pro tunc order has so cured the defects in the order as appealed from that we now may consider the appeal upon the merits.
>
> This issue is determined in favor of retaining this appeal following the action taken in (*Remington Rand* v. *Interhandel*) . . . decided March 29, 1951.
>
> Prior to the Remington Rand decision, this court had recently considered Rule 54(b) as applied to situations somewhat differing from that presented here. (Citing *Roberts* v. *American Newspaper Guild*, 188 F. 2d 650; *Felder* v. *Loughran Co.*, 188 F. 2d 623; *David* v. *D. C.*, 187 F. 2d 204.)
>
> The Remington Rand opinion does not mention this issue but the situation there was the same as here in essentials. In that case, Rule 54(b) had not been complied with at the time of appeal but, after the appeal had been docketed here, a nunc pro tunc order (similar to the one here) had been procured *and there was consent thereto by all the parties.* This court, in considering that appeal on the merits, obviously held that Rule 54(b) had been sufficiently complied with." (Emphasis supplied)

[15] Points and authorities in opposition to *nunc pro tunc* order (R. 411).

54(b). In this case the order was made after appeal but before argument and the judgment was affirmed.

In view of the admission by the court below in the *Vale* case that prior to the *Remington Rand* decision it had considered Rule 54(b) as applicable to situations differing somewhat[16] from that there presented, only one conclusion can be reached: *In some cases non-compliance with Rule 54(b) will require dismissal for want of jurisdiction. In other cases jurisdiction may be conferred by consent of the parties to a nunc pro tunc order entered pending appeal.*

The fact that there is no guide by which the distinction may be assessed is already indicated by the action of other courts of appeal. For example, the Second Circuit has held that where Rule 54(b) is not complied with, there is no jurisdiction of the appeal. *Flegenheimer* v. *Manitoba Sugar Co.*, 182 F. 2d 742; *Kaufman & Ruderman* v. *Cohn & Rosenberger*, 177 F. 2d 849; *Tobin Packing Co.* v. *North American Car Corp.*, 188 F. 2d 158; *Republic of China* v. *American Express Co. Inc.*, July 17th, 1951, 15 Fed. Rules Serv. 54b 4, Case No. 7; *Lyman* v. *Remington Rand*, 188 F. 2d 306.

In all of these cases, including the case last cited which involved petitioner[17], the appeals were dismissed despite the fact that in at least one of these cases the absence of the determination and direction required by the rule resulted from obvious inadvertence.[18]

Since the decision here sought to be reviewed, this Court

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[16] In the *Roberts* case, *supra*, the absence of the express determinations under the Rule was ground for dismissal of the appeal, the court below stating its concurrence with *Etten* v. *Kauffman*, CCA 3, 179 F. 2d 302; in the *Felder* case, the court below dismissed, *per curiam*, an appeal for want of jurisdiction for lack of compliance with Rule 54(b), this on the authority of its earlier decision in *David* v. *District of Columbia*, 187 F. 2d 204.

[17] *Lyman* v. *Remington Rand* (C. A. 2) 188 F. 2d 306.

[18] In the *Republic of China* case, *supra*, the Court recognized this. Compare to the question in the case at bar where a finding of no just reason for delay is a very real issue—an issue upon which, we contend, the irregular procedure in this case resulted in grave prejudice to petitioner.

has granted a writ of certiorari to the United States Court of Appeals for the Seventh Circuit in the case of *Gem Mfg. Co., Petitioner,* v. *Packard Motor Car Co., Respondent,* October Term 1951, No. 21, which involves the applicability of Rule 54(b) to appeals taken under Section 1292 (1). It should be pointed out that the appeal in this case was taken under Section 1291, and therefore a decision in the *Gem Mfg. Co.* case will not be controlling as regards appeals under Section 1291, unless this Court should hold that Rule 54(b) is applicable to appeals under both Sections 1291 and 1292(1). Even in that event the questions here presented differ from those in the *Gem Mfg. Co.* case because there no attempt was made to shore up the district court record by a *nunc pro tunc* order. The Seventh Circuit, as far as appeals under Section 1291 are concerned, has aligned itself with those circuits which hold that when Rule 54(b) has not been complied with, orderly procedure requires that the appeal be dismissed, leaving to the discretion of the district court its further action in the premises. *Packard Motor Car Co.* v. *Gem Mfg. Co.,* 187 F. 2d 65; *Winsor* v. *Daumit,* 179 F. 2d 475. In the *Winsor* case, *supra,* at 478, the court said:

> "In view of the fact that the rule itself defines the power and function of the district court, orderly procedure requires that we dismiss the appeal, leaving to the discretion of the district court its further action in the premises."

The Government begs the question when it asserts in its footnote at page 8 that the district court in the case at bar complied with Rule 54(b). The facts are otherwise. The *nunc pro tunc* order was of no effect if jurisdiction, as a concept, means power to determine the issues. The anomaly here makes this difficult to explain; however, it is clear that by virtue of the docketing of this case in the Court of Appeals, the district court could not act until the Court of Appeals either dismissed the appeal or expressly empowered the district court to make a determination while the

case was still pending on appeal. Equally, the Court of Appeals had no jurisdiction to render a decision on the district court's order from which the appeal was taken because it was interlocutory and had not been made appealable. However, its course was clear, namely, dismissal of the appeal. 2d Cir. *Republic of China* v. *American Express Co. Inc.; Tobin Packing Co.* v. *North American Car Corp.; Lyman* v. *Remington Rand;* 3d Cir., *Etten* v. *Kauffman;* 7th Cir., *Packard Motor Car Co.* v. *Gem Mfg. Co.; Winsor* v. *Daumit;* all *supra.*

The efect of this *nunc pro tunc* procedure is, to say the least, confusing. The question arises as to when, if ever, is an appeal perfected beyond the reach of the trial court. Must the courts of appeal sit by and wait for *nunc pro tunc* orders beyond the prescribed time for perfecting appeals? The courts in other circuits have given the answer by dismissing the appeals where the trial court has not complied with Rule 54(b) at the time the appeal is taken. In some instances they have indicated that on a subsequent appeal, they would not require a reprinting of the record and briefs. The Court of Appeals for the District of Columbia has clearly indicated its own confusion regarding the present case and has increased the jurisdictional hazards by misconstruing its decision in the *Remington Rand* case, in its subsequent decision in *Vale, supra.*

The purpose of Rule 54(b) is to make clear what interlocutory orders in multiple-claim proceedings are appealable. This purpose should not be defeated by such deviation from orderly procedure as is apparent in the case at bar. This Court has the power to enlighten the courts, the bar and litigants as to what they should, can and indeed, must do—if they are to comply with and have their rights accorded to them by the Federal Rules of Civil Procedure. Lest rights be prejudiced and justice miscarry in the future in proceedings involving Rule 54(b), we respectfully urge the Court to grant this petition, and by its decision make clear what procedure the courts of appeal should follow where an appeal is taken without compliance with Rule

54(b) and at the same time direct the lower court to remand the case to the district court to correct the prejudicial errors which occurred there. These include the Court's action *sua sponte* in setting the intervening petition for trial before it was at issue and far in advance of the main case; the court's erroneous rulings on the admission and exclusion of evidence; and the manifest and flagrant errors in the trial court's Findings of Fact and Conclusions of Law.

Respectfully,

WILLIAM P. MACCRACKEN, JR.,
Attorney for Petitioner.

Of Counsel,
URBAN A. LAVERY,
WILLIAM W. BARRON,
FRANK C. STERCK.